

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

**BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL**

ORDER

IN RE:)
Protest of METS Corporation)
Appeal of METS Corporation)

Case No.: 2003-9

This matter came before the South Carolina Procurement Review Panel for a hearing on January 14, 2004. The Panel heard an appeal of the December 1, 2003 decision of the Chief Procurement Officer (CPO) by METS Corporation. In his order, the CPO affirmed the solicitation of the Information Technology Management Office (ITMO) - South Carolina Budget and Control Board for a Uniform Statewide Voting System for the State Election Commission. On December 10, 2003, METS Corporation appealed that decision.

At the hearing before the Panel on January 14, METS Corporation was represented by Cravens Ravenel, Esquire. The South Carolina Election Commission was represented by Elizabeth Crum, Esquire. Keith McCook, Esquire, represented the Chief Procurement Officer.

MOTION TO DISMISS

The Election Commission moved to dismiss the arguments of METS Corporation's appeal on several grounds. The motion and our rulings are as follows:

The Election Commission argued that Item #1 failed to state a claim because it raised an issue that is not within the Panel's purview. Specifically, it asked the Panel to go outside of the Procurement Code to decide an issue. Item #1 of the appeal questioned the authority of the Election Commission to authorize the solicitation for a Uniform Statewide Voting System based on South Carolina election statutes.

We find issues related to the solicitation made under the South Carolina Procurement Code are within our authority to decide when they relate to the propriety of a procurement action. Clearly, the legislature intended to give the Panel the authority to consider all aspects of a solicitation for state business because the legislature afforded the Panel the authority to determine that a solicitation is in violation of the law. S.C. Code Ann. §11-35-4310 (Supp.2003). The clear language of this statute does not limit that “law” to the Procurement Code and the Panel has not interpreted it that way in the past. In Re: Protest of Councils on Aging, Transportation Management Services, Inc., Spartanburg Regional Health Care System; Appeal by Councils on Aging, Transportation Management Services, Inc., Spartanburg Regional Health Care System, Case No. 1997-12. Therefore, we deny the Motion to Dismiss Item #1 of the appeal and decide it on its merits below.

Item #2 of the appeal concerned the solicitation’s requirement of the number of voting machines that must be provided per number of registered voters in a precinct. Further, METS claimed that requiring an increased number of machines while limiting the total expenditure would serve to restrict the number of companies that could bid on the solicitation. The Election Commission claimed that METS Corporation had no standing to raise the issue. We disagree. METS Corporation is an entity that engages in the business of election equipment. A solicitation of this magnitude concerning a uniform statewide voting system would certainly be important to any such business. “To have standing...one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” Charleston County School Dist. v. Charleston County Election Commission, 336 S.C. 174, 181, 519 S.E.2d 567,

571 (1999)(quoting Anchor Point Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E. 2d 546, 549 (1992).

Further, on December 8, 2003, the South Carolina Court of Appeals upheld a taxpayer suit in Greenville County that challenged a decision that it was in the county's best interest to proceed on a large construction project by a method other than competitive sealed bidding. In the case, the court found a taxpayer had a real, material, and substantial interest in whether the County followed the procurement procedures set out in the county code. Sloan v. Greenville County, Op. No. 3704 (S.C.Ct.App. filed Dec. 8, 2003) (Shearouse Adv.Sh. No. 43 at 73). The Motion to Dismiss is denied as to Item #2.

Item #3 was challenged by the Election Commission on the grounds that METS Corporation did not have standing and also failed to state a claim. METS challenged the solicitation on the basis that is made no provisions for the voting equipment the counties are currently using. We grant the Motion to Dismiss finding that the Protestant did not state a claim for which relief can be granted. Assuming arguendo that the Panel agreed with METS, there is no legal basis on which we could order the relief he seeks. There is nothing in the Code that requires a solicitation such as this to address existing equipment.

The Election Commission moved to dismiss Item #4 claiming that it failed to state a claim and that the basis on which METS appealed was an untimely protest . Without reaching the issue as to whether the language of the appeal was encompassed in the original protest and order, we dismiss Item #4 for failing to state a claim. METS asked us to interpret the Help America Vote Act (HAVA) to determine if the State Election Commission followed the language of HAVA. The HAVA is a federal law and whether or not the Election Commission

has followed it is not actionable as a part of this solicitation. Therefore, that is not a claim this Panel has the authority to decide.

The Election Commission also moved to dismiss Item #5 of the appeal on the issue of mootness. METS agreed to the dismissal of this ground and therefore, it is no longer before us.

FINDINGS OF FACT

On October 10, 2003, the Information Technology Management Office (ITMO) of the South Carolina Budget and Control Board issued Solicitation 04-S6230 on behalf of the State Election Commission (SEC). The SEC is a state agency governed by a commission with its daily functions performed by an executive director and staff.

The solicitation sought proposals for services and products for a uniform statewide voting system for South Carolina. The SEC intended to fund the system in large part with federal appropriations provided under the Help America Vote Act of 2002 (HAVA). Currently, the counties of South Carolina solicit for and provide their voting machines and voting systems. There is no requirement that the counties be uniformed in their systems. Some counties have indicated a desire to participate in this statewide system and some have indicted the desire to participate under certain conditions. A state HAVA committee is responsible for establishing the parameters of the program for the state.

The solicitation sought among other things to find a company that could provide five voting units per 1000 voters. Ms. Andino, Executive Director of the State Election Commission, testified that the reason for this was to ensure enough machines for each precinct. She said that other states who have purchased machines under this program indicated they did not buy enough machines. Plus, she said with the growth in the state, she wanted to be sure that the machines

would serve the state for many years. Also, she testified that this will mean the state will spend about \$3,300 per machine which is the average nationwide for machine expense.

CONCLUSIONS OF LAW

The solicitation in this matter is one made by ITMO for the benefit of the State Election Commission. The State Election Commission and its executive director have broad powers as set out in S.C. Code Ann. §7-3-10 and §7-3-20 and throughout Title 7. These provisions allow the commission and its executive director to be involved in the election process throughout the State. Historically, counties have provided their own voting equipment pursuant to the authority at S.C. Code Ann. §7-13-1660. However, the choice of that equipment it is still subject to approval of the State pursuant to the same statute. In this instance, the State is purchasing equipment through a federal program for the benefit of the entire state. There is nothing in Title 7 that prohibits them from doing so. In fact, §7-3-20 (C)(6) allows the executive director of the Commission to "...purchase, lease, or contract for the use of such equipment as may be necessary to properly execute the duties of his office...." There is also nothing that mandates that the counties participate in the program. We conclude that it is within the authority of the State Election Commission to issue this solicitation.

Section 7-13-1680 of the South Carolina Code of Law (Supp. 2003) sets out the number of voting machines needed for elections. It says, "The governing body of any county or municipality providing voting machines at polling places for use at elections shall provide for each polling place at least one voting machine for each two hundred fifty registered voters...." The solicitation calls for five machines per 1000 voters and state statute provides there must be at

least four per 1000 voters. Obviously, the use of the words "at least" mean the legislature approved the use of more machines per number of voters so there is no violation of the statute.

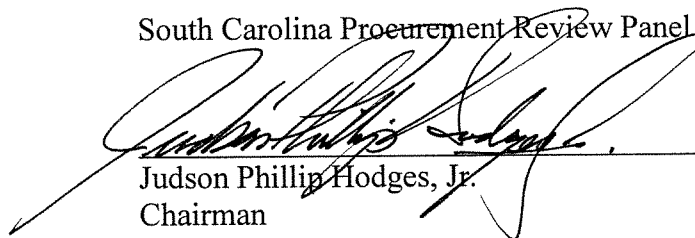
However, the decision cannot be made by the State if it is simply an attempt to weed out certain vendors or to favor certain vendors. Previously, the Panel has said, "...[a] specification can be restrictive so long as it is not unduly so-- in other words, it must be written in such a manner as to balance the reasonable, objective needs of the State against the goal of obtaining maximum practicable competition....the Panel will not substitute its judgment for the judgment of the using and procuring agencies so long as the choice of specification is not unreasonable, arbitrary, capricious or contrary to the Procurement Code." In Re: Protest of Cambex Corporation; Appeal by Cambex Corporation, Case No. 1992-7. Ms. Andino clearly explained the reasons for putting this specification in the solicitation and we conclude that her choice was reasonable and was not arbitrary, capricious, or contrary to the Procurement Code.

ORDER

For the foregoing reasons, the Panel **AFFIRMS** the CPO decision upholding the solicitation for a uniform statewide voting system by ITMO on behalf of the State Election Commission.

AND IT IS ORDERED.

South Carolina Procurement Review Panel



Judson Phillip Hodges, Jr.
Chairman

February 3, 2004